Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

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State registration required before domestic partners may assert rights. California's *Domestic Partner Rights and Responsibilities Act* (*Fam. Code* §§ 297 *ff.*) extends many of the rights and duties of marriage to persons registered as domestic partners. But not any kind of registration suffices to bring partners under the provisions of the act. Nor does merely observing the forms of a marriage relationship have such a result. In *Velez v. Smith* (Cal. App. First Dist., Div.1; September 12, 2006) 142 Cal.App.4th 1154; [48 Cal.Rptr.3d 642, 2006 DJDAR 12315], the parties had filed a declaration of domestic partnership with the city and county of San Francisco and attended a public commitment ceremony. But they failed to register their relationship with the state. In affirming an order striking a petition for dissolution, the Court of Appeal held that registration with the state was a prerequisite before the act applied.

No judgment incorporating settlement unless parties concur. *Code Civ. Proc.* §664.6 allows the court to enter judgment pursuant to the terms of a settlement if the *parties to the litigation* so agree in writing or in open court. (For detailed discussion regarding the application of the statute (See, Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2006) ¶ 12:950 ff, pp. 12(II)-101 ff.). But the term "parties to the litigation" is strictly construed and where the agreement is between a party and the other party's insurance carrier, the statute does not apply. *Elnekave v. Via Dolce Homeowners Association* (Cal. App. Second Dist., Div.8; September 12, 2006) 142 Cal.App.4th 1193; [48 Cal.Rptr.3d 663, 2006 DJDAR 12336].

NOTE: The fact that a settlement agreement cannot be enforced under § 664.6, does not mean that the agreement is unenforceable. A settlement agreement is a contract and normal remedies for breach of contract are available. A party to the agreement may seek to amend the pleadings to allege the settlement agreement and then seek summary judgment on the issue. In the alternative a new lawsuit may be filed for breach of the settlement agreement.

Don't get into a dispute with the Highway Patrol. The chilling facts of abuse of power are illustrated in *Grassilli v. Barr* (Cal. App. Fourth Dist., Div.1; September 13, 2006; *As Mod.* October 13, 2006) 142 Cal.App.4th 1260; [2006 DJDAR 12383], where the Court of Appeal affirmed substantial damages and awarded punitive damages to a victim of such abuse by members of the California Highway Patrol.

Laptop computer may be searched by custom officials. The 9th Circuit has ruled that a laptop carried by a passenger arriving in the U.S. could be searched by custom officials without a search warrant or probable cause. When Mr. Romm crossed the border into the United States, the laptop computer that he carried with him was intensively searched by customs officials. In *U. S. v. Romm* (Ninth Cir. Ct. App. 2006) 455 F.3d 990, the court held that the search was legally permissible and affirmed Romm's conviction for child exploitation.

Appeal from judgment does not cover post-judgment fee order. Generally (and with exceptions) only final judgments and post-judgment orders are appealable. (*Code Civ. Proc.* §904.1) But an appeal from the judgment does not encompass post-judgment orders; a separate notice of appeal from such an order is required to confer jurisdiction on the Court of Appeal. In *Colony Hill v. Ghamaty* (Cal. App. Fourth Dist., Div.1; September 15, 2006) 142 Cal.App.4th 1408; [48 Cal.Rptr.3d 798, 2006 DJDAR 12536], the defendant only filed a notice of appeal from the judgment. In his brief he not only attacked the judgment but also sought reversal of the post-judgment order awarding plaintiff fees. He was out of luck. The notice of appeal from the judgment was not sufficient to preserve the issue of attorney fees for review on appeal. A separate notice of appeal was required.

Plaintiffs in pending cases subject to Proposition 64 may amend to add proper plaintiff. Proposition 64, adopted on November 2, 2004, requires that a plaintiff suffer damages before they may bring an action for unfair competition. These modified standing requirements apply to pending cases. (*See, Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227; [138 P.3d 207, 46 Cal.Rptr.3d 57, 2006 DJDAR 9607]). But it was an abuse of discretion for the trial court to deny plaintiff leave to amend by adding a new party plaintiff with standing under Proposition 64. *Foundation for Taxpayer and Consumer Rights v. Nextel Communications, Inc.* (Cal. App. Second Dist., Div.1; September 21, 2006) 143 Cal.App.4th 131; [48 Cal.Rptr.3d 836, 2006 DJDAR 12891].

Parties to arbitration agreement cannot confer jurisdiction on the courts to review merits of arbitrated dispute. A provision in an arbitration agreement purporting to provide for judicial review of errors of law by the arbitrator is void. *Cable Connection, Inc. v. DirectTV, Inc.* (Cal. App. Second Dist., Div.4; September 22, 2006) 143 Cal.App.4th 207; [49 Cal.Rptr.3d 187, 2006 DJDAR 12921].

Where a demurrer is sustained, dismissal without prejudice is no longer proper. Where the court sustains a demurrer with leave to amend and plaintiff fails to file a timely amendment, defendant is entitled to a dismissal with prejudice. *Code Civ. Proc.* §581(f)(2). This same rule applies where plaintiff does file an amended complaint after a demurrer is sustained but fails to assert a cause of action against a defendant. *Cano v. Glover* (Cal. App. Second Dist., Div.6; September 25, 2006) 143 Cal.App.4th 326; [48 Cal.Rptr.3d 871, 2006 DJDAR 13001].

Declaration supporting summary judgment must contain factual basis for declarant's conclusions. In a medical malpractice case defendants obtained summary judgment based on a physician's declaration stating that the defendants had met the standard of care. The Court of Appeal reversed because the declaration was conclusionary and failed to state the facts upon which it was based. *Johnson v. Sup.Ct. (Rosenthal)* (Cal. App. Third Dist.; September 25, 2006) (Cal. App. Third Dist.; September 25, 2006) 2006 DJDAR 13014].

Being hit in the face by a club is not a risk inherent in the game of golf. As we have previously reported *Knight v. Jewett* (1992) 3 Cal.4th 296; [834 P.2d 696, 11 Cal.Rptr.2d 2] and its progeny held that, where parties engage in sports, the doctrine of primary assumption of risk shields a defendant from a negligence claim, if the risk that resulted in plaintiff's injury is inherent in the sport. In *Hemady v. Long Beach Unified School District* (Cal. App. Second Dist., Div. 3; September 28, 2006) 143 Cal.App.4th 566; [2006 DJDAR 13135], the Court of Appeal held that the doctrine did not apply where a student was hit in the face by a club during school golf lessons because this risk is not inherent in the game of golf.

We correct a case reference. In our September newsletter we suggested the reader refer to *Kreeger v. Wanland* (2006) 141 Cal.4th 826; [46 Cal. Rptr. 3d 790], to learn of the disastrous consequences to lawyers who become personally embroiled in the emotions surrounding litigation. The cite should have been to the companion case of *Wanland v. Law Offices of Mastagni, etc.* (Cal. App. Third Dist.; July 6, 2006) 141 Cal.App.4th 15; [45 Cal. Rptr. 3d 633].

Court has equitable powers to set aside an order obtained by a fraud on the court. In *Marriage of Deffner* (Cal. App. Fourth Dist., Div.3; September 28, 2006) 143 Cal.App.4th 662; [49 Cal.Rptr.3d 424, 2006 DJDAR 13248], a husband's lawyer purported to represent the wife also when presenting a marital settlement agreement to the court. The agreement was extremely unfavorable to the wife. The Court of Appeal affirmed an order setting aside the agreement some two years after the court had approved it. Although *Fam. Code* §2122 establishes a one year statute of limitations in actions to set aside a marital settlement agreement, here the fraud was perpetrated *on the court*; it is unlikely that the court would have approved the agreement in the absence of the false representation that wife was represented by a lawyer who recommended approval of the agreement. Thus, the fraud was on the court. Citing, *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (1944) 322 U.S. 238; [64 S.Ct. 997, 88 L. Ed. 1250], the Court of Appeal concluded that courts have the equitable power to set aside an order, or judgment, obtained through such a fraud.

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